

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 14, 2007

STATE OF TENNESSEE v. MALCOLM COLLINS LEWIS

**Appeal from the Criminal Court for Davidson County
No. 2006-B-1368 Seth Norman, Judge**

No. M2007-00610-CCA-R3-CD - Filed April 29, 2008

Appellant, Malcolm C. Lewis, pled guilty in Davidson County to possession of a controlled substance with intent to sell. As part of the plea agreement, Appellant agreed to a five-year sentence. Appellant subsequently filed a petition to suspend sentence pursuant to Tennessee Code Annotated section 40-35-314(c). The trial court denied the petition stating that it was “without authority” to alter Appellant’s sentence. Because the trial court’s order is unclear as to its basis for the denial of Appellant’s petition, we remand the case for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Remanded.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES, and JOHN EVERETT WILLIAMS, JJ., joined.

Emma Rae Tennent, Assistant Public Defender (on appeal) and Allegra Montgomery, Assistant Public Defender, (at hearing), for the Appellant Malcolm Collins Lewis.

Robert E. Cooper, Jr., Attorney General & Reporter; David H. Findley, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Sharon Reddick, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

On June 2, 2006, the Davidson County Grand Jury indicted Appellant with one count of introducing a controlled substance into a penal institution, one count of possession of .5 grams or more of a controlled substance with intent to sell, and one count of driving on a suspended driver’s license. On September 21, 2006, the trial court accepted a negotiated guilty plea. As part of the plea, Appellant agreed to serve a five-year sentence at thirty percent release eligibility for the

possession of a controlled substance conviction. Appellant's sentence was ordered to be served with "C.C.A."¹ This sentence was ordered to run concurrently to an unrelated four-year sentence stemming from conviction in another division of the Davidson County Criminal Court. The other two counts were dismissed.

On December 11, 2006, Appellant filed a Petition for a Suspended Sentence pursuant to Tennessee Code Annotated section 40-35-314(c). The trial court held a hearing on both January 12 and 19 of 2007. After hearing argument from both Appellant and the State, the trial court took the matter under advisement. On February 15, 2007, the trial court entered an order dismissing Appellant's petition based upon the conclusion that the trial court was without authority to modify Appellant's agreed upon sentence after accepting his guilty plea.

ANALYSIS

One issue is presented for review, whether the trial court was correct in determining that it was without authority to suspend Appellant's sentence which was imposed pursuant to a negotiated plea agreement. Appellant argues that the trial court did have authority to suspend his sentence under Tennessee Code Annotated section 40-35-314(c). The State argues that the trial court's determination was correct.

The trial court's order reads as follows:

The state argues that the Court is without authority to modify the agreed sentence entered pursuant to the guilty plea due to the fact that the type of agreement is binding on the Court and is therefore not subject to modification under Rule 11(c)(1)(C) of the Tennessee Rules of Criminal Procedure, formerly Rule 11(e)(1)(C). The state relies upon the ruling in *State v. Ernesto Gonsales*, 2003 WL 22697299, No: E2002-02687-CCA-R3-CD (Tenn. Crim. App., at Knoxville, Nov. 14, 2003) in support of its argument.

Rule 35(b) of the Tennessee Rules of Criminal Procedure allow for a modification of sentence where it "may be proper in the interest of justice." *State v. Hodges*, 815 S.W.2d 151, 154 Tenn. 1991) [sic]. However, certain Tennessee caselaw exists wherein distinctions between different types of guilty plea agreements have been outlined and analyzed.

¹ The judgment form reflects that Appellant is to serve his sentence in "C.C.A." This is an acronym for Corrections Corporation of America which privately manages a local penal facility for Davidson County. Accordingly, Appellant's sentence is one that is permitted by law for those counties which have contracted with the Tennessee Department of Corrections to house convicted felons. See T.C.A. §§ 40-35-104(b), 40-35-314.

Subsection (c) under Rule 11 of the Tennessee Rules of Criminal Procedure, which used to be under subsection (e), provides for various ways in which plea agreements can be entered. The relevant portion of that Rule sets out the following:

(1) In General. The district attorney and the defendant's attorney, or the defendant when acting pro se, may discuss and reach a plea agreement. The court shall not participate in these discussions. If the defendant pleads guilty or nolo contendere to a charged offense or a lesser or related offense, the plea agreement may specify that the district attorney general will:

- (A) move for dismissal of other charges;
- (B) recommend, or agree not to oppose the defendant's request for, a particular sentence, with the understanding that such recommendation or request is not binding on the court; or
- (C) agree that a specific sentence is the appropriate disposition of the case.

Tenn. R. Crim. P. Rule 11(c).

Based on an objective reading of the Rule, it appears as though the defendant entered the guilty plea in this matter under subsection(c)(1)(C), as a specific sentence was agreed upon by the parties and placed into effect. The court in [*Gonsales*] stated that agreements entered under the aforementioned Rule which call for specific sentences divest trial courts of their power to modify a defendant's sentence unless it was required in the "interest of justice," such as cases involving "unforeseen post-sentencing developments." *Gonsales*[, at] *6.

State v. Grady Hargrove, 1993 WL 300759, Nos: 01S01-9203-CC-00035, 01S01-9203-CC-00036, 03S01-9203-CC-00026 (Tenn., Nashville, Aug[.] 9, 1993) outlined the distinctions between the types of plea agreements and the application of Rule 35(b). *Hargrove* "strongly suggests that an alteration of a defendant's sentence is generally prohibited if it violates the plea agreement entered into under Rule 11(e)(1)(C)." *State v. McDonald*, 893 S.W.2d 945, 947 (Tenn. Crim. App. 1994); *Hargrove*[, at] *1.

Moreover, "Rule 11 does not contain a provision that would allow a trial court to alter the terms of a plea agreement entered pursuant to subsection (e)(1)(C). Thus, based on the plain language of the statute, we conclude that the trial court does not have authority to alter the terms of a plea agreement accepted pursuant to Rule 11(e)(1)(C). Rather, the trial court's choices are either to accept or reject the agreement in its entirety, including the agreed upon sentence." *State v. Soller*, 181 S.W.3d 645, 648 (Tenn. 2005).

Thus, relying on the Court's previous determination that the agreement in the present case was entered pursuant to Rule 11(c)(1)(C), formerly Rule 11(e)(1)(C), of the Tennessee Rules of Criminal Procedure, it appears as though a specific, agreed upon sentence was imposed. Therefore, the Court believes that it is without authority to modify the defendant's sentence as a result.

We initially point out that this Court is unable to ascertain whether the trial court determined that it did not have jurisdiction to suspend Appellant's sentence, or whether after considering the merits of Appellant's petition, the trial court determined that suspension of Appellant's sentence was not in the interest of justice. This problem is exacerbated by the fact that the trial court does not discuss the merits of Appellant's petition in its order.

In its determination that it was without authority to alter Appellant's sentence, the trial court relies heavily on the fact that the sentence was part of a negotiated plea pursuant to Rule 11(c)(1)(C) of the Tennessee Rules of Criminal Procedure. The trial court also refers to the petition as if it was filed pursuant to Rule 35 of the Tennessee Rules of Criminal Procedure. The trial court states that Rule 11(c)(1)(C) does not allow a trial court to alter a sentence, just accept or deny it. It is true that Rule 11(c)(1)(C) and caselaw do not provide for the alteration of a sentence. It is also true that pursuant to Rule 11 a trial court may only accept or reject an agreed sentence. However, the Rule involves a trial court's authority to alter the terms of a plea agreement prior to the entry of the plea agreement and the sentencing of the defendant. In *State v. Hodges*, 815 S.W.2d 151 (Tenn. 1991), our supreme court stated that "There is absolutely no connection between the plea bargaining procedures prescribed in Tenn. R. Crim. P. 11 and the correction or reduction of sentence provisions of Tenn. R. Crim. P. 35." 815 S.W.2d at 154. Therefore, Rule 11 does not preclude the trial court from determining whether to grant or deny Appellant's petition.

As stated above, the trial court also relies upon Rule 35(b) of the Tennessee Rules of Criminal Procedure, and cases interpreting that rule, to support its denial of Appellant's petition for suspended sentence. Rule 35 allows for the reduction of a defendant's sentence if the motion is filed within 120 days. Tenn. R. Crim. P. 35(a). A trial court can reduce the sentence, but only to a sentence that may have originally been imposed by the trial court. Tenn. R. Crim. P. 35(b). The Advisory Commission Comments for Rule 35 state that, "The intent of this rule is to allow modification only in circumstances where an alteration of the sentence may be proper in the interests of justice."

The appellate courts of this State have analyzed the application of Rule 35 when a defendant has entered a negotiated plea and subsequently filed a motion pursuant to Rule 35. In *State v. McDonald*, 893 S.W.2d 945 (Tenn. Crim. App. 1994), our court interpreted an unreported supreme court case which held that alteration of negotiated plea agreement sentences is limited in scope. 893 S.W.2d at 947 (citing *State v. Grady Hargrove*, Nos. 01S01-9203-CC-00035; 01S01-9203-CC-00036; 03S01-9203-CC-00026, 1993 WL 300759, at *2 (Tenn., at Nashville, Aug. 9, 1993), *reh'g denied*, (Sept. 27, 1993)). In *McDonald* we held that although the success of a petition pursuant to Rule 35 in the case of a negotiated plea agreement pursuant to Rule 11(c)(1)(C) would be very

limited, the limitation did not result in a waiver of a defendant's ability to file such a motion. *Id.* In addition, this Court stated that "a situation may arise where unforeseen, post-sentencing developments would permit modification of a sentence in the interest of justice." *Id.*

However, we point out that Appellant's petition was not filed pursuant to Rule 35, but rather Tennessee Code Annotated section 40-35-314(c). This statute applies to defendants who are confined to a local jail or workhouse, such as Appellant, and states that:

The court shall retain full jurisdiction over the defendant during the term of the sentence and may reduce or modify the sentence or may place the defendant on probation supervision where otherwise eligible. Following the first application, applications to reduce or to alter the manner of the service of the sentence may be made at no less than two (2) month intervals.

Tenn. Code Ann. § 40-35-314(c). It appears then that Rule 35(b) applies to situations where the defendant has been sentenced to confinement in the Department of Corrections or the local jail or workhouse. The Advisory Commission Comments to Rule 35 state the following:

This rule is somewhat similar to its federal counterpart. Under T.C.A. § 40-35-212, the trial judge retains jurisdiction to modify any sentence which is to be served in the jail or workhouse. However, the statute deprives the court of authority to modify a sentence to the department of corrections once the judgment is final in the trial court.

....

This rule *does not alter the authority of the court to modify sentences to the jail or workhouse*. These modifications are governed by statute. *See* T.C.A. §§ 40-35-306, 40-35-307, 40-35-311, and 40-35-312.

(emphasis added).

The Advisory Commission Comments reference Tennessee Code Annotated sections 40-35-306 and 40-35-307. These statutes contain substantially similar provisions to that in Tennessee Code

Annotated section 40-35-314(c).² There are other similar statutes concerning defendants confined to the local jail or workhouse. *See* Tenn. Code Ann. § 40-35-308(c); Tenn. Code Ann. § 40-35-315.

We have been unable to find any caselaw that directly addresses whether a defendant may file a petition to alter his sentence pursuant to Tennessee Code Annotated section 40-35-314 when he has entered a negotiated plea pursuant to Rule 11(c)(1)(C) of the Tennessee Rules of Criminal Procedure. However, in a case determining the standard of review to be employed when reviewing a trial court's treatment of a petition under Tennessee Code Annotated section 40-35-306, our supreme court stated that a petition under Tennessee Code Annotated section 40-35-306(c), a similar provision to that found in Tennessee Code Annotated section 40-35-314(c), is "akin to a motion to reduce a sentence" under Rule 35. *State v. Ruiz*, 204 S.W.3d 772, 777 (Tenn. 2006). The court goes on to state that they are similar because they call for the trial court to reconsider the sentence and that such a petition is distinct from a direct appeal of a sentence. *Id.* We find this analysis of Rule 35 and Tennessee Code Annotated section 40-35-306 instructive. As stated above, Tennessee Code Annotated sections 40-35-314 and 40-35-306, among others, concern sentences that are to be served in the local jail or workhouse. We conclude that as in petitions pursuant to Rule 35 to alter a sentence, when the defendant has entered a negotiated plea and petitions the trial court to alter his sentence pursuant to Tennessee Code Annotated section 40-35-314(c) the trial court has the authority to consider the petition on the merits, a defendant, who agreed to a sentence in his negotiated plea pursuant to Rule 11(c)(1)(C), may only be successful on a petition to alter his sentence pursuant to Tennessee Code Annotated section 40-35-314(c) when there have been "unforeseen, post-sentencing facts" as described in *McDonald* that make altering the sentence in the interest of justice.

As noted, we are unable to discern from the order petition whether the trial judge believed he was without legal authority to suspend Appellant's sentence or whether the judge believed the merits of the petition do not warrant granting it.

CONCLUSION

For these reasons, we remand this case to the trial court for further proceedings in accordance with this opinion.

JERRY L. SMITH, JUDGE

² Tennessee Code Annotated section 40-35-306(c) states, "At any time during the period of continuous confinement ordered pursuant to this section, the defendant may apply to the sentencing court to have the balance of the sentence served on probation supervision. The application may be made at no less than two-month intervals." Tennessee Code Annotated section 40-35-307(f) states, "At any time during the period of periodic confinement, the defendant may apply to have the balance of the periodic confinement sentence served on probation without further confinement. The application may be made at no less than two-month intervals."

